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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA,	)	NO. CR-15-00226-BLF
	)	
Plaintiff,	)	UNITED STATES' MOTION <i>IN LIMINE</i> NO. 2
	)	TO PRECLUDE IMPROPER EVIDENCE AND
v.	)	ARGUMENT
	)	
DOUGLAS STROMS YORK,	)	Pretrial Conference: July 16, 2015
	)	Trial Date: July 20, 2015
Defendant.	)	
	)	<b>Honorable Beth L. Freeman</b>

The United States hereby respectfully submits the following Motion *in Limine*.

**I. The Defendant Should Be Precluded from Introducing Improper Argument and Evidence.**

The government moves this Court to prohibit the defendant from arguing and presenting evidence designed to elicit jury nullification, that is, from pursuing lines of inquiry that are not legal defenses to the charges in the indictment. "An unreasonable jury verdict, although unreviewable if it is an acquittal, is lawless, and the defendant has no right to invite the jury to act lawlessly. Jury nullification is a fact, because the government cannot appeal an acquittal; it is not a right, either of the jury or the defendant." *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996); see also *United States*

MOTION *IN LIMINE* TO PRECLUDE IMPROPER EVIDENCE AND ARGUMENT  
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1 *v. Sepulveda*, 15 F.3d 1161, 1190 (1st Cir. 1993) (“Neither court nor counsel should encourage jurors to  
 2 exercise [nullification] power... A trial judge, therefore, may block defense attorneys’ attempts to  
 3 serenade a jury with the siren song of nullification.”)

4 This Circuit has never recognized a right held by defendants to seek nullification of a guilty  
 5 verdict. See *Zal v. Steppe*, 968 F.2d 924, 930 (9th Cir. 1992) (Trott, J., concurring) cert. denied, 113  
 6 S.Ct. 656 (1992); *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991); *United States v.*  
 7 *Simpson*, 460 F.2d 515, 518-19 (9th Cir. 1972). “As [a defendant] has no right to seek jury nullification,  
 8 he has no right to present evidence relevant only to such defense.” *United States v. Griggs*, 1995 WL  
 9 7669 \*3 (C.A.9 1995), cert denied, 115 S.Ct. 1415 (1995). Citing *Zal, id.*, a defendant has “no  
 10 constitutional right to present evidence merely to ‘bring out the reason for [his] actions.’ *Id.* at 929.

11 Although the government cannot predict each and every form of nullification defendant might  
 12 invoke, the following serve as examples:

13 **A. Victim’s Bad Acts and Character for Untruthfulness**

14 The defendant should be prohibited from arguing or presenting evidence regarding Andrea York,  
 15 his estranged wife’s, behavior or alleged bad acts or character for untruthfulness. Federal Rules of  
 16 Evidence Rule 608 prohibits extrinsic evidence to prove specific instances of a witness’s conduct in  
 17 order to attack or support the witness’s character for truthfulness. Such evidence or argument is  
 18 irrelevant to the defendant’s guilt. Ms. York’s truthfulness or prior actions are not relevant to the  
 19 charge, as defendant’s conduct was what gave rise to the federal charges.

20 Rule 403 of the Federal Rules of Evidence provides further that even relevant evidence may be  
 21 inadmissible, “if its probative value is substantially outweighed by the danger of unfair prejudice.” The  
 22 Ninth Circuit Model Jury Instructions explicitly instruct jurors to “not be influenced by any personal  
 23 likes or dislikes, opinions, prejudices, or sympathy.” § 3.1 (2010 Ed.). Here, there is no probative value  
 24 for introducing the victim’s conduct. Moreover, there is substantial risk that the jury would be  
 25 improperly influenced by dislike of the victim should the defendant be allowed to present evidence that  
 26 victim may have acted in a negative manner during the divorce proceedings. Presenting this evidence  
 27 would be aimed simply to negate defendant’s culpability for his behavior that led to the current charges.

1 This would constitute improper evidence intended only to outweigh or nullify his misconduct in this  
 2 case and gain sympathy or divert blame from the jury.

### 3 **B. Potential Punishment**

4 The government moves to preclude, as irrelevant and prejudicial, any reference by the defense to  
 5 the defendant's potential sentence during all phases of the trial (including jury selection, opening  
 6 statements, examination of witnesses, including the defendants if they elect to testify, and summation).  
 7 That reference could be as overt as, "You understand the defendant is facing a potential life prison term  
 8 if convicted," or more subtle such as, "the defendant is facing a lot of time," "this case has serious  
 9 consequences for the defendant," "the defendant's liberty is at stake in this trial," or "your decision will  
 10 have consequences for a long time to come." Once the jury hears anything about punishment, the bell  
 11 simply cannot be un-rung or the damage neutralized by a curative instruction.

12 "It has long been the law that it is inappropriate for a jury to consider or be informed of the  
 13 consequences of their verdict." *United States v. Frank*, 956 F.2d 872, 879 (9th Cir. 1992). As explained  
 14 in *Pope v. United States*, 298 F.2d 507 (5th Cir. 1962):

15 To inform the jury that the court may impose minimum or maximum sentence, will or will not  
 16 grant probation, when a defendant will be eligible for parole, or other matters relating to disposition of  
 17 the defendant, tend to draw the attention of the jury away from their chief function as sole judges of the  
 18 facts, open the door to compromise verdicts and to confuse the issue or issues to be decided. *Id.* at 508;  
 19 see also *Shannon v. United States*, 512 U.S. 573, 579 (1994) ("[P]roviding jurors sentencing information  
 20 invites them to ponder matters that are not within their province, distracts them from their fact-finding  
 21 responsibilities, and creates a strong possibility of confusion"); *Rogers v. United States*, 422 U.S. 35, 40  
 22 (1975) (explaining that jury should have been admonished that it "had no sentencing function and  
 23 should reach its verdict without regard to what sentence might be imposed"); *United States v. Reed*, 726  
 24 F.2d 570, 579 (9th Cir. 1984) (holding that trial judge properly instructed jury that the "punishment  
 25 provided by law for the offenses charged in the indictment are matters exclusively within the province of  
 26 the court. It should never be considered by the jury in any way in arriving at an impartial verdict as to  
 27 the guilt or innocence of the accused"). Therefore, defense counsel should be precluded from making  
 28

1 any reference in the presence of the jury to punishment in statements, questions or argument.

2 **II. Conclusion**

3 For all of the foregoing reasons, the Court should rule as set forth above if and when the issues  
4 identified arise. The Government would respectfully reserve the right to supplement this motion *in*  
5 *limine* if additional issues requiring the Court's ruling arise.

6  
7 DATED: July 2, 2015

Respectfully submitted,

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10 /s/  
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